1-4-2010

State v. Green Respondent's Brief Dckt. 36723

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 36723
	)	
vs.	)	
	)	
BRADLEY D. GREEN,	)	
	)	
Defendant-Appellant.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

HONORABLE ROBERT ELGEE
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Bradley D. Green appeals from the denial of his motion to suppress.

Statement Of Facts And Course Of Proceedings

Officer Garth Davis of the Hailey Police Department observed Green driving 38 mph in a 25 mph zone. (Tr., p.6, L.23 – p.7, L.2; p.11, L.21 – p.13, L.2.) After stopping Green for speeding, Officer Davis noticed that Green smelled like alcohol, slurred his speech, and had glassy and bloodshot eyes. (Tr., p.11, L.21 – p.15, L.19; p.31, L.18 – p.33, L.20.)

Officer Davis asked Green to exit his vehicle and perform standard field sobriety tests. (Tr., p.17, Ls.21-24.) Green however, refused to perform the tests and demanded that his attorney be present. (Tr., p.17, L.25 – p.20, L.14.) Officer Davis told Green that he was not entitled to consult counsel at that time. (Tr., p.19, Ls.20-23.) Officer Davis then arrested Green for DUI.[1] (Tr., p.21, Ls.5-12.)

Officer Davis transported Green to the intoxilyzer room of the Blaine County Jail. (Tr., p.21, L.20 – p.22, L.7.) Green refused to submit to the breath test. (Tr., p.24, L.21 – p.25, L.15.) Officer Davis then filled out an affidavit in support of a a warrant to draw Green's blood, which was transported to and signed by a judge. (Tr., p.26, Ls.8-16; p.27, Ls.13-16.) In the interim, Green

[1] The relevant citation indicated that Officer Davis arrested Green for "DUI Refusal" pursuant to I.C. § 18-8002(3). (R., p.4.) However, Officer Davis testified that he arrested Green for "DUI", and Green ultimately pled guilty to driving under the influence, in violation of I.C. § 18-8004. (Tr., p.21, Ls.5-12; R., pp.55-63.) The magistrate court found that Officer Davis arrested Green "ostensibly for refusing to submit to evidentiary tests." (R., p.43.)

continued to request that he be permitted to consult his lawyer, but was not permitted to do so. (Tr., p.27, Ls.2-12.)

Green was transported to a hospital where his blood was drawn. (Tr., p.27, L.13 – p.29, L.13.) He was then transported back to the Blaine County Jail, where he was booked, a process that was delayed by Green's lack of cooperation. (Tr., p.29, L.19 – p.30, L.6.) Green bonded out from jail at 4:40 am, approximately one hour and ten minutes after the blood draw.[2] (Tr., p.30, Ls.11-13; p.36, Ls.7-22.)

Green filed a motion to suppress evidence obtained by Officer Green during the investigation, arguing that he was denied his right to consult with counsel during the attempted administration of the field sobriety tests, and after he was arrested, up until when he bonded out. (R., pp.17-19.) After a suppression hearing, the magistrate court denied the motion. (R., pp.36-38; 43-48.) Green entered a conditional guilty plea to DUI. (R., pp.55-63.) In its appellate capacity, the district court affirmed the magistrate court's denial of Green's motion to suppress. (R., p.111.) Green filed a timely appeal. (R., pp.113-116.)

[2] The record does not indicate the results of the blood test, or whether the blood was actually tested.

ISSUE

Green states the issues on appeal as:

A: *WERE GREEN'S DUE PROCESS RIGHTS VIOLATED WHEN HE WAS NOT ALLOWED TO COMMUNICATE WITH AN ATTORNEY DURING THE INITIAL STOP BUT MORE IMPORTANTLY AFTER THE EVIDENTIARY PROCEDURE FOR ALCOHOL TESTING WAS COMPLETED UP UNTIL HE WAS RELEASED FROM JAIL?*

B: *DID THE MAGISTRATE ERR IN ITS REASONING WHEN IT DENIED GREEN'S MOTION TO SUPPRESS?*

C: *SHOULD GREEN'S BLOOD TEST RESULTS BE SUPPRESSED FROM EVIDENCE?*

(Appellant's brief, p.7 (emphasis and capitalization in original).)

The state rephrases the issue on appeal as:

Has Green failed to show that the magistrate erred in denying his motion to suppress?

ARGUMENT

Green Has Failed To Show That The Magistrate Court Erred In Denying His Motion To Suppress

A. Introduction

Green contends that the magistrate court erred in denying his motion to suppress.[3] (See generally, Appellant's brief.) He alleges that his due process rights were violated when he was denied the opportunity to consult with counsel to arrange alternative testing during the officer's attempted administration of the field sobriety tests, and at all times after his arrest, excluding during the state's attempted administration of the BAC breath test. (Id.)

Green's contention fails. While the Idaho appellate courts have recognized a statutory and due process right to contact an attorney in order to facilitate a DUI suspect's gathering of evidence *after* his submission to the state's evidentiary test, there is no statutory or due process right to contact an attorney before submitting to an evidentiary test.

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[3] Green contends that all evidence and observations of Green's intoxication, including the odor of alcohol coming from Green during the traffic stop and Green's slurred speech, should be suppressed as a remedy for the alleged due process violation. (Appellant's brief, p.21.) However, if this Court does determine that Green's due process rights were violated, the only appropriate remedy, consistent with State v. Carr, 128 Idaho 181, 911 P.2d 774 (Ct. App. 1995), is the suppression of the state's blood test results, not the officer's observations that occurred prior to the alleged due process violation. Id. at 185. See also State v. Cantrell, 139 Idaho 409, 411, 80 P.3d 345, 347 (Ct. App. 2003) ("When a DUI detainee is denied additional testing by peace officers, the results of the evidentiary testing done by the state are inadmissible.")

B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The appellate court "examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." Id. "If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, [the appellate court] affirm[s] the district court's decision as a matter of procedure." Id. (citing Losser, 145 Idaho at 670; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

"The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found." State v. Faith, 141 Idaho 728, 729-730, 117 P.3d 142, 143-144 (Ct. App. 2005).

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004).

C. Green Did Not Have A Right To Consult With Counsel Prior To The Blood Draw

"The right of a defendant charged with an alcohol-related driving offense to obtain additional testing is derived from both statutory and constitutional sources." State v. Hedges, 143 Idaho 884, 886, 154 P.3d 1074, 1076 (Ct. App. 2007).

Green cites I.C. § 18-8002, State v. Madden, 127 Idaho 894, 908 P.2d 587 (Ct. App. 1995), and State v. Carr, 128 Idaho 181, 911 P.2d 774 (Ct. App. 1995), for the proposition that he had a right to consult counsel at various times prior to the blood draw. (See generallly Appellant's brief.) None of these authorities, however, extend this right to any time prior to when the DUI suspect actually submits to a state-administered intoxication test.

Idaho Code § 18-8002(4)(e)[4] provides, in relevant part:

> After submitting to evidentiary testing at the request of the peace officer, [a DUI suspect] may, when practicable, at his own expense, have additional tests made by a person of his own choosing.

(emphasis added.)

The plain language of I.C. § 18-8002(4)(e) provides a statutory right to procure additional tests, only after submitting to a peace officer's evidentiary tests. A DUI suspect does not have a right, under I.C. § 18-8002(4)(e), to interrupt the state's investigation to pursue his own.

[4] Prior to 2009, I.C. § 18-8002(4)(e) was codified as I.C. 18-8002(4)(d). The state will refer to this statute as I.C. § 18-8002(4)(e), even when referencing its application in appellate court opinions prior to 2009.

In State v. Madden, 127 Idaho 894, 908 P.2d 587 (Ct. App. 1995), the Idaho Court of Appeals held that from the I.C. § 18-8002(4)(e) statutory right to procure additional testing and evidence after submitting to a peace officer's evidentiary test, necessarily follows a DUI suspect's right to contact an attorney to facilitate such testing and evidence gathering, even if the suspect is still in custody. Id. at 896. In Madden, the DUI suspect submitted to the state's breath test,[5] then directly asserted her statutory right for an independent test and the opportunity to communicate with her attorney to arrange it. Id. at 895. These requests were denied by the attending police officers for several hours. Id. at 895-896. The Idaho Court of Appeals held that the state thus violated I.C. § 18-8002(4)(e), and that the appropriate remedy was suppression of the state's BAC test results. Id. at 589-590.

In State v. Carr, 128 Idaho 181, 911 P.2d 774 (Ct. App. 1995), Carr submitted to the state's breath test, and then requested to speak to a lawyer, but did not specifically request the opportunity to arrange an independent BAC test. Id. at 182-183. The Idaho Court of Appeals noted that because Carr, unlike Madden, did not specifically assert her statutory right to an independent BAC test, the "statutory issue is not squarely before us as it was in *Madden*." Id. at 183. However, the Court held that even when the I.C. § 18-8002(4)(e) right is not directly asserted, a DUI suspect has a Fourteenth Amendment due process right to consult with an attorney via telephone, upon request, after she submits to a state evidentiary test, in order to obtain an independent test or otherwise obtain

[5] Madden agreed to take a breath test, and blew a BAC of .211. She refused to blow a second time. Madden, 127 at 896, 908 P.2d at 589.

a "fair opportunity to defend against the [s]tate's accusations." Id. at 183-184, quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

The Court, however, continued to recognize that like the statutory right of I.C. § 18-8002(4)(e), the companion due process right applied only after a DUI suspect actually submits to the peace officer's evidentiary test:

> [T]he only opportunity for a defendant in a DUI case to gather exculpatory evidence is within a reasonable time following arrest and administration of the [s]tate's BAC test. As a result, when a person is arrested for DUI and given an evidentiary BAC test, that person must be allowed, at a minimum, to make a phone call upon request to do so.

Carr, 128 Idaho at 184, 911 P.2d at 777 (emphasis added, citations omitted).

> Allowing an individual arrested for DUI to make a telephone call once the [s]tate administers its evidentiary BAC test ensures that the arrestee will be given the opportunity to obtain exculpatory evidence.

Id. at 185. (emphasis added.) In State v. Shelton, 129 Idaho 877, 880, 934 P.2d 943, 946 (Ct. App. 1997), the Court of Appeals noted that the issue in Madden and Carr was "the right to a second BAC test." (emphasis added.)

Green contends the statutory right of I.C. § 18-8002(4)(e) as recognized by Madden, and the companion due process right illustrated in Carr, expand further, and that he had a right to consult with counsel during the officer's attempted administration of the field sobriety tests, upon his arrival at the police station after his arrest, and after he refused the state's BAC test. (See generally, Appellant's brief.) This assertion is contrary to the plain language of I.C. § 18-8002(4)(e), and is not supported by Carr, or any other authority presented by Green. Under I.C. § 18-8002(4)(e), the Fourteenth Amendment, Madden, and

Carr, the state is permitted to successfully administer an evidentiary test *before* the DUI suspect's right to pursue an alternative test takes effect.

An argument similar to Green's was rejected by the Minnesota Supreme Court. In State v. Larivee, 656 N.W.2d 226 (Minn. 2003), Larivee, a DUI suspect, refused to submit to the state's evidentiary test, and instead directly requested that a person of his choosing be permitted to come to the jail to perform an independent test.[6] Id. at 228. The attending officer denied this request. Id. Larivee argued that the state thus violated his statutory and constitutional due process right to an independent evidentiary test. Id. at 228-229.

The Minnesota Supreme Court first endeavored to determine the extent of Larivee's statutory right to his own independent test. Id. at 229. Minn.Stat. § 169.123, subd. 3(a) (2000),[7] which is similar to I.C. § 18-8002(4)(e), states, in relevant part:

> The person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state.

The Minnesota Supreme Court held that because Larivee refused the state's evidentiary test, he was not a "person tested" under the statute, and thus

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[6] Larivee was permitted to contact an attorney after he was read the Minnesota Implied Consent Advisory. Larivee, 656 N.W.2d at 228. Minnesota law, unlike Idaho law, allows a DUI suspect to consult with an attorney before making the decision whether to submit to a chemical intoxication test. Compare Friedman v. Commissioner of Public Safety, 473 N.W.2d 828, 835 (Minn. 1991) with I.C. § 18-8002(2).

had no right to obtain an independent test. Larivee, 656 N.W.2d at 229. The Minnesota Supreme Court also recognized that the statutory phrases "in addition", "additional test", and "after the test administered," indicated that the statute was intended to grant a statutory right only to those who have first submitted to the police-administered test. Id.

Similarly, I.C. § 18-8002(4)(e) clearly intends, as illustrated by the phrases "after submitting to evidentiary testing," and "additional tests," to grant a statutory right only to those who have first submitted to the police-administered tests.

The Minnesota Supreme Court next addressed the issue of whether Larivee's constitutional due process rights were violated by the denial of his request for an independent test. Id. at 230. Applying California v. Trombetta, 467 U.S. 479 (1984), and Brady v. Maryland, 373 U.S. 83 (1963), the Minnesota Supreme Court held that because there was no evidence in the record that the alcohol-concentration tests administered by the state were inaccurate, there were no assurances that the independent test would be exculpatory, and therefore Larivee had no due process right to an independent test. Larivee, 656 N.W.2d at 231-232.

As noted by the Minnesota Supreme Court in Larivee, "many other jurisdictions that have addressed this issue have found no due process violation." Id. at 232. See State v. Zoss, 360 N.W.2d 523, 524 (S.D. 1985) ("If [the DUI suspect] had wanted possible exculpatory evidence, she could have consented to the breath test which may have been exculpatory and still had a chance of getting a possible exculpatory blood test. There is nothing fundamentally unfair

in this procedure, nor did it deny her a 'meaningful opportunity to present a complete defense.'"); People v. Dewey, 431 N.W.2d 517 (Mich. App. 1988); Allen v. State, 494 S.E.2d. 229 (Ga. App. 1997) (holding that DUI suspect waived his constitutional due process right to an additional BAC test by refusing to take state's BAC test). But see State v. Swanson, 722 P.2d 1155 222 (Mont. 1986); Smith v. Cada, 562 P.2d 390 (Ariz. App. 1977); State v. Choate, 667 S.W.2d 111 (Tenn. Crim. App.1983).

This Court should follow the jurisdictions which have found that a DUI suspect does not have a constitutional due process right to refuse the state's evidentiary test and then immediately arrange his own. It is not fundamentally unfair to allow the state to successfully complete an evidentiary test before a DUI suspect is permitted to begin his investigation. If, as stated by the Idaho Court of Appeals in Carr, this right to further investigation is rooted in a DUI suspect's "interest in procuring evidence which would challenge the results of the [s]tate's BAC test" (Carr, 128 Idaho at 184), it makes no sense for this right to apply before the state can actually successfully complete such a test.

Idaho Code § 18-8002A(2)(f) requires the state to inform a DUI suspect, at the time of evidentiary testing, that "[a]fter submitting to evidentiary testing you may, when practicable, at your own expense, have additional tests made by a person of your own choosing." (Emphasis added). If, as Green contends, a DUI suspect also has the right to refuse the state's evidentiary test and then immediately arrange his own, I.C. § 18-8002A(2) must be unconstitutionally

misleading, as it would fail to adequately inform, and would perhaps mislead, the DUI suspect about the extent of his rights. Green has made no such contention.

Green makes the additional argument that incorrect information relayed by the police officer to Green during the traffic stop somehow expanded his rights under I.C. § 18-8002(4)(e), Madden, and Carr. (Appellant's brief, pp.4-5, 9.) The arresting officer informed Green that he was not entitled to counsel during the officer's attempted administration of the field sobriety tests because of Idaho's implied consent statute. (Tr., p.18, L.18 – p.19, L.2.) The officer also informed Green that he was arresting him for refusing to submit to the field sobriety tests. (Tr., p.20, L.22 – p.21, L.4.)

However, as the district court recognized, any erroneous information communicated by the officer had no effect on Green's actions, and in no way expanded Green's rights under I.C. § 18-8002(4)(e), Madden, and Carr. (Tr., p.41, L.5 – p.42, L.3.) Green has not explained how his rights were violated by these communications, or how they expanded his right to communicate with counsel for the purpose of facilitating an alternative BAC test. Even if the officer was mistaken about the consequences of Green's refusal to submit to the field sobriety tests, and did not clearly articulate the nature of the implied consent statute – Green still refused to submit to the tests. He was not tricked or otherwise unlawfully persuaded to submit to the tests. Further, there is no indication in the record, or argument from Green, that these communications unreasonably delayed the DUI investigation process.

Green finally appears to contend that I.C. § 18-8002(2), which provides that, "[A DUI suspect] shall not have the right to consult with an attorney before submitting to such evidentiary testing," provides, by implication, an affirmative statutory right to consult with counsel, and the reasonable means to do so, before and after refusing to submit to the state's evidentiary testing. (Appellant's brief, pp.11-12.) However, the plain language of I.C. § 18-8002(2) provides no affirmative rights at all, and actually denies a DUI suspect the right to consult with an attorney until he submits to the state's evidentiary test. It does not follow, as Green contends, that "it is only during the time that Idaho Code § 18-8002 is being applied that [Green] does not have the right to counsel." (Appellant's brief, p.11.)

Green did not have a right to consult with counsel for the purposes of arranging alternative testing and gathering evidence until, at the earliest, he actually took an evidentiary test administered by the state. This Court should affirm the magistrate's court denial of his motion to suppress.

D. Green Has Failed To Show That His Due Process Rights Were Violated After The Blood Draw

Green contends that he had a due process right to consult with counsel "up until the time that he was released from custody," presumably including the time after the blood draw when he was still in custody. (Appellant's brief, p.1) The contention, however, is not supported by argument or authority. When issues on appeal are not supported by propositions of law, authority, or

argument, they will not be considered on appeal. State v. Zichko, 129 Idaho 259, 923 P.2d 966 (1996).

Further, the record is devoid of evidence that the state denied or materially interfered with Green's opportunity to contact counsel or make arrangements for additional testing once Green actually submitted to the blood draw. Sometime after the blood draw, but before Green bonded out, Officer Davis, the only testifying witness at the suppression hearing, had left the Blaine County Jail and was back at his office. (Tr., p.30, Ls.11-18.) Thus, while Green bonded out of jail at 4:40 am, approximately one hour and ten minutes after the blood draw, it is unclear from the record when, or whether, he was given access to a telephone prior to his release. Finally, the record indicates that Green's lack of cooperation in the booking process, in refusing to give Officer Davis his address or social security number, caused some delay between the blood draw and when Green bonded out. (Tr., p.29, L.22 – p.30, L.6.)

Green has thus not adequately argued, and cannot show, that any right to arrange alternative testing was violated after the blood draw, and thus cannot show that the magistrate court erred in denying his motion to suppress.

CONCLUSION

The state respectfully requests this Court to affirm the magistrate court's denial of Green's motion to suppress.

DATED this 4th day of January 2010.

MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January 2010 I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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MWO/pm